# THE ORIGINAL PACKAGE INEPTITUDE.

Goods brought into a State of the Union, come from another State or territory of the United States, or from another country. A State might, in a number of ways, interfere with this introduction. It might prevent or restrain the negotiation, the contract, between its residents and those of other States or nations, which precedes and induces the despatch of the goods. It might forbid or embarrass by onerous restrictions, by requiring licenses for which fees are exacted, or in other ways, the physical act of bringing the goods across the State's boundary, and to any interior point in it. It might penalize or tax the possession of such goods, the use or the sale of them.

The 7th section of Article 1 of the Constitution confers on Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes", with the qualification that it shall not tax articles exported from any State, nor give a preference to the ports of one State over those of another. This clause would probably render any other prohibition upon the States, with respect to interstate or international commerce, superfluous. The State is, however, explicitly forbidden to lay any duties on imports or exports, except for inspection or to lay any duty of tonnage.

In making the preliminary negotiation looking to sale, or in making the contract of purchase, prior to the sending of the article bought, to the buyer in State B, the manufacturer or vendor in State A may despatch agents, drummers, etc. into State B for the purpose of soliciting purchases. Whether these agents use samples, or verbal descriptions is immaterial. State B cannot absolutely forbid the use of these agents, nor require them to obtain a license for which they must pay a fee or tax.[1]

The taking of goods out of State A into State B, or the bringing of them from B to A, might be forbidden, or subjected to clogs and restrictions. These restrictions might

[1] Robbins *v.* Shelby County Taxing District (1887) 120 U. S. 489; Asher *v.* Texas (1888) 128 U. S. 129; Brennan *v.* Titusville (1894) 153 U. S. 289.

conceivably operate directly on the buyer, or the seller, or his agent, or on the instruments of vehiculation; on railroad, express and steamboat companies. Under the Constitution, the agent of an extra-State express company cannot be required to obtain a license.[1] A State cannot tax the business of transportation out of or into its territory. It cannot penalize a railroad company for bringing liquors[2] or other articles of commerce into it, although for the object of promoting its policy of preventing sales and diminishing consumption. It cannot, in pursuance of any aim, however worthy, prohibit to some the navigation of a river, a highway of interstate traffic, in order to secure a monopoly of the use of it to another.[3]

When goods are once within a State, do they become wholly subject to its power? May it treat them as it treats indigenous goods, criminalizing, if it will, or otherwise restraining the possession, the use, or the sale of them? Sometimes, in the exercise of a "prohibition" policy, the State has forbidden the mere presence of liquor within its bounds, without regard to its place of origin, and has authorized the seizure and destruction of it. Sometimes for the sale of articles introduced from beyond the State, a preliminary license is exacted, or after such sale, a tax is imposed on the seller. The employment of an auctioneer, or drummer or other agency is subjected to restraint and burdened with a tax. When a thing which is an article of commerce, has been brought into a State, it cannot be seized and taken from its owner because of any law forbidding its introduction. Such a law is unconstitutional, and the officer who seizes the article is a trespasser[4] and it can be recovered from him.[5]

A frequent object of importation is the sale of the thing imported. Can a State forbid or restrict this sale?

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[1] Crutcher *v.* Kentucky (1891) 141 U. S. 47.

[2] Bowman *v.* Chicago etc. Railway Co. (1888) 125 U. S. 465.

[3] Gibbons *v.* Ogden (1824) 9 Wheat. 1.

[4] Scott *v.* Donald (1897) 165 U. S. 58. The South Carolina Dispensary Law.

[5] Leisy *v.* Hardin (1890) 135 U. S. 100; American Express Co. *v.* Iowa (1905) 196 U. S. 133. Beer introduced into a State in violation of its prohibition law.

"There is no difference," said Marshall, C. J.,[1] "in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods (that is, relatively few goods) would be imported, if none could be sold." The right to bring liquors[2] or cigarettes[3] or oleomargarine[4] into a State, despite its exclusionary policy, carries with it the right to exemption from the prohibition of selling them.

While not absolutely prohibiting the sale of the introduced goods, the State may attempt to condition the right to sell, in a more or less onerous manner. It may, for example, compel the taking out, at a price, of a license in advance of the sale. Such exaction would be unconstitutional.[5] The State may impose an annual tax on the business of selling cigarettes, but such a tax, imposed on one who sold in the original bulk, cigarettes brought from another State, would probably be void.[6]

Can a State tax, as property, a thing which has been brought into it from outside? Different answers have been given to the question according to the American or foreign origin of the thing. If it has been brought from another country, a certain immunity attaches to it for a time, which seemingly, will not attach to it, if it has come from another State. Wines from France still in the ownership of the importer, and in the casks, barrels, etc. in which they were imported,[7] and lace still in the boxes in which it was introduced,[8] could not be taxed by a State even as property and like other property, not imported, of the same class.

A tax on the thing imported, whether imposed because it has been imported, or because it is a thing having value,

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[1] Brown *v.* Maryland (1827) 12 Wheat. 419.

[2] Leisy *v.* Hardin (1890) 135 U. S. 100; Lyng *v.* Michigan (1890) 135 U. S. 161. *Contra,* License Cases (1847) 5 Howard 504.

[3] Austin *v.* Tennessee (1900) 179 U. S. 343 (implied).

[4] Schollenberger *v.* Pennsylvania (1898) 171 U. S. 1.

[5] Brown *v.* Maryland (1827) 12 Wheat. 419.

[6] Cook *v.* Marshall County (1905) 196 U. S. 261; Austin *v.* Tennessee (1900) 179 U. S. 343.

[7] Low *v.* Austin (1871) 13 Wall. 29; Hinson *v.* Lott (1868) 8 Wall. 148; American Steel Co. *v.* Speed (1904) 192 U. S. 500.

[8] May *v.* New Orleans (1900) 178 U. S. 496.

would, it is supposed, be added by the merchant to the price of the thing, and the State imposing it would thus raise a revenue from the purchasers of the thing, many of whom would be residents of other States. "A duty on imports" said Marshall, C. J., "is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States."[1]

It seems, however, that goods introduced from other States are not exempt from a non-discriminatory State taxation, if they are no longer *in transitu*, but have reached their destination. By a narrow interpretation of the word "imports" which confines the application of the word to exotic goods, the prohibition on a State of laying "any imposts or duties on imports or exports,"[2] is held not to extend to goods brought from one State, whether by water or land, into another.[3] A tax on the thing brought into State A from State B is not an impost or a duty on an import. Is it not however an interference with interstate commerce? If the thing in the original bulk, and in the hands of the person who introduced it into the State, may be taxed, it may, to employ the logic of Marshall, C. J., be taxed high as well as low; its price may be increased, and its vendibleness correspondingly reduced. The belief of the Chief Justice[4] that the principle applicable to importations from abroad is applicable to "importations (sic) from a sister State," has been rejected in later cases. "The several States, therefore" says White, J.,[5] "not being controlled as to such merchandise (from other States) by the prohibition against the taxation of imports, it was held that the States had the power, after the goods had reached their destination, and were held for sale (even in the original package) to tax them without discrimination, like other property situated within the State."[6] A tax upon one, as an auctioneer or commission merchant, on account of sales

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[1] Brown *v.* Maryland (1827) 12 Wheat. 419.

[2] Const. Art. 1, sect. 10.

[3] Brown *v.* Maryland (1827) 12 Wheat. 419; American Steel Co. *v.* Speed (1904) 192 U. S. 500; Brown *v.* Houston (1885) 114 U. S. 622; Woodruff *v.* Parham (1868) 8 Wall. 123.

[4] Brown *v.* Maryland (1827) 12 Wheat. 418.

[5] American Steel Co. *v.* Speed (1904) 192 U. S. 500.

[6] Brown *v.* Houston (1885) 114 U. S. 622; Hinson *v.* Lott (1868) 8 Wall. 148.

of goods brought from another State, if not discriminatory against goods of other States, is valid,[1] as is a requirement that one who peddles goods, even goods from another State, shall obtain a license.[2]

The entrance of goods from a foreign country or from another State cannot be constitutionally prevented by a State, nor can the use or sale of such goods. How long does this immunity last? A thing that has been imported never ceases to have been imported. Is it forever superior to the jurisdiction of the State?

It is clear that if all trace of the extraneous origin of a thing should be lost, it could no longer be exempt from the State's power. Are there any other limitations? Will wine which has come from France be beyond State taxation so long as its source is known? Will beer that has been brought into a prohibition State be always vendible despite the local law?

The first attempt to define the conditions with which the import must continue to comply, in order to preserve its franchise, was made by Chief Justice Marshall. "When the importer has so acted on the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has," he remarks, somewhat timidly, "perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." Later cases have applied these tests, not merely to "imports" in the narrow sense of that word,[3] but to articles introduced from one State to another.[4]

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[1] Woodruff *v.* Parham (1868) 8 Wall. 123; Ficklen *v.* Shelby County (1892) 145 U. S. 1.

[2] Emert *v.* Missouri (1895) 156 U. S. 296; Machine Co. *v.* Gage (1879) 100 U. S. 676. A tax special to peddlers of goods from another State would be void. Welton *v.* Missouri (1875) 91 U. S. 275; Walling *v.* Michigan (1886) 116 U. S. 446; Tiernan *v.* Rinker (1880) 102 U. S. 123.

[3] May *v.* New Orleans (1900) 178 U. S. 496 (lace); Low *v.* Austin (1871) 13 Wall. 29 (wine).

[4] Pervear *v.* Massachusetts (1866) 5 Wall. 475 (liquors); Shollenberger *v.* Pennsylvania (1898) 171 U. S. 1 (oleomargarine); Leisy *v.* Hardin (1890) 135 U. S. 100 (beer); Vance *v.* Vandercook Co. (1898) 170 U. S. 438 (liquor); American Express Co. *v.* Iowa (1905) 196 U. S. 133 (liquor).

The incorporation and mixing up with the mass of the property of the State is manifestly no test. One pint of water can be "mixed up" with another pint, and the molecules of the respective pints be indistinguishable. But such "mixing up" is not the object of the justice's contemplation. The evidence that a given thing was imported may be lost; and it might then be said to be "incorporated" with, "mixed up" with, the mass of property. But, how can a thing, *e. g.* a sewing machine, an automobile, signs of whose foreign make are indelible, be said with any propriety to be "mixed up" with anything else? One occupies one spot, and another another spot. They are not transfused into each other. They remain separately perceptible, numerable, and identifiable. "Incorporating", "mixing up", are evidently figures of speech and not objective facts.

The first palpable fact mentioned by the Chief Justice as a test is that the thing remains the property of the importer. Though no change is wrought on the thing imported, though it remains in the same case or package in which it was introduced, it loses the immunities of an import, when it ceases to belong to the importer. The State can tax it after his sale; it can tax the sale of it by his vendee,[1] it can prohibit and penalize the sale of it by his vendee.[2] It is declared to become mingled with the general mass of property in the State, by the importer's act of selling it, even "in the original package."[3]

But, even before a sale of it, the importer may produce effects of various sorts upon it. The suggestion that the thing must remain in the importer's warehouse must probably not be taken seriously. The article must first get to the warehouse. While going thither it is an import. From the warehouse it may be taken to a store for sale, or to a factory for the reception of some change of form or quality. While going from the warehouse, while exposed in the store for sale, it would probably not be held to have lost its import-immunity.

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[1] Waring *v.* Mayor (1868) 8 Wall. 110.

[2] Pervear *v.* Massachusetts (1866) 5 Wall. 475.

[3] Vance *v.* Vandercook Co. (1898) 170 U. S. 438.

But the importer may break the original bulk formed by the things imported and their case and inclosure, separating its parts from each other, with a view either to his own consumption of them, the manufacture or the sale of them. By so doing, although he remains the owner, the articles have ceased, though still in fact an import, to be an import in law. The constitutional privileges of an import fall away from it. In May *v.* New Orleans[1] lace had been put into cartons, each containing twelve pieces, and each piece twelve yards. The cartons had been placed together in a box or case. Small packages of towels, containing two, three or five dozens, had been put together in a wooden case. In these cases the goods entered the country. They were broken open, but the contained packages were not individually broken. It was held that, though they were still the property of the importer, the lace and towels could be taxed by the State.

The reason assigned by Marshall, C. J., for the freedom of imported goods from State control until a sale or a breach of the bulk of the package by the importer, is, in brief, this. The goods are imported in order to be sold. If the State can prohibit a sale, it can practically prohibit importation. If it can tax at all the import, or the act of importation, it can tax so heavily as practically to prohibit importation. With this logic before him it is singular that he should concede that the import lost its exemption from State control as soon as the original bulk was broken, or as soon as it was sold unbroken. Importation takes place with a view to wholesale or to retail. There cannot be a retail sale, even by the importer, without breach of the original package, unless the package has been made to contain no more of the article than the consumer would buy at retail. If it is true that "no goods would be imported if none could be sold," it is likewise true that no goods would be imported for retail sale if none could be sold at retail. In order to preserve the power to import for retail, it is necessary to preserve the power of the importer to sell at retail. But this power is virtually taken from him, when on the one hand, he is prevented from

[1] (1900) 178 U. S. 496. That breaking bulk destroys the immunity, is asserted in Low *v.* Austin (1871) 13 Wall. 29.

opening his package, if he would avoid State obstructions to sale, and on the other hand, inconvenience or judicial decision, posing as law, compels him to employ large packages. If wine is put into separate pint or quart packages, cloth into separate parcels of four or six yards, shoes into separate boxes containing one pair, the inconvenience and the expense of transportation, and the risk of loss of or injury to the articles imported, will be seriously increased. Beginning with the assumption that any one has, as against a State, the right to import anything into it, and the right to sell what he imports, it seems almost infantile to add that if he breaks his packages, he loses the freedom from State control, and therefore he must import to sell only at wholesale or he must increase the cost of importation by employing unbusinesslike packages.

Why should the constitutional right to import and sell, depend on the size or form of the package? Why should it be confined to sales of the whole package at one time, to one person, or group of persons? If it really was the intention of the constitution-makers to take from the State the power to prevent sales at wholesale and sales at retail, by importers, why not frankly say so, and hold as a corollary, that it was their intention that the importer should be able to consult convenience of trade, with regard to the size of the packages in which he brings the goods, and the size of the portion of them, which he disposes of in any particular sale? To impute to the framers of the constitution the intention to give a right superior to the State to import big packages, only, and to sell the whole package only, would be to suspect them of imbecility. Nor is there the slightest intimation in the constitution itself, of its intention to distinguish between the commerce that requires big and that which requires little packages, or between the power of the merchant to sell at wholesale, and to sell at retail, that which he imports.[1] Any line of demarcation between federal and State power over commerce, which practically subjects importations for retail to the State, while exempting from it those for wholesale is, it is not too much to say, arbitrary and absurd.

[1] Cf. Shollenberger *v.* Pennsylvania (1898) 171 U. S. 1, where the sale to the consumer of ten pound tubs of oleomargarine, introduced from another State, was held permissible despite the State's prohibitory law.

But, conceding that the retailing importer is practically not protected from State control, by the constitution as interpreted by the Supreme Court, is the wholesale importer in any better plight? A has imported a cask of wine, or a box of laces. He would not do this unless he could sell. He cannot subdivide and sell it, so he loses at least one-half of his motive to import. He cannot sell to consumers or to small dealers. The class of his customers is straitened. But, if A sells the unbroken bulk, his purchaser, B, buys it, in order that he may break it and sell its parts. But, the State can now intervene. It can tax B on account of his sales. It may confiscate the goods, while in the unbroken package, even, or it may criminalize the selling of them. A, let us suppose, has introduced a tub of oleomargarine containing 200 lbs. into a State which makes it a crime to have for sale or to sell oleomargarine. The constitution gives him the right, in defiance of the State, to sell the tub to B. But why should B buy? As soon as he becomes the owner of it, if he holds it for sale, he becomes a criminal. B buys, if at all, in order that he may sell. The State prevents his selling. Virtually, then, the State prevents, his buying. As "no goods would be imported if none could be sold,"[1] no goods would be bought for sale, if none could be sold. But if the State prevents B's buying, (and B stands for everybody within the state except A) it prevents A's selling. If it prevents A's selling it prevents A's importing, for sale. The result is, that the doctrine that one sale even in the original package, or the breach of the package, even by the importer, removes all restrictions from State control, virtually subjects the importation itself to State control, if the reasoning in Brown *v.* Maryland has any validity.

It is not my purpose to indicate any other constitutional restraints on State interference with commerce. Possibly should a State undertake to forbid the sale of silk, or iron, or beef, or leather, its action would be condemned under some other clause of the Constitution. What it is here meant to say, is that under the interpretation imposed on it by the courts, the commerce clause o. the Constitution is of little value, and the immunities tendered by it are largely illusory.

[1] Marshall, C. J., in Brown *v.* Maryland (1827) 12 Wheat. 419.

Brown *v.* Maryland and other cases have held that A can import and sell once, in the original package, anything which is recognized by congress to be an article of commerce, whether it be oleomargarine [1] or beer [2] or tobacco. [3] The effort of the State to prevent such importation, or such sale, is a usurpation. As the courts had hampered commerce by holding that if the importer, in order to make a sale, broke the package, he *ipso facto* lost the power to make the sale if the State forbade it, sensible men would easily be conducted to the conclusion that the constitution makers, for some reason, looked with disfavor on original package breaches. They reward the sale whole with immunity from local control, they punish the breach of the crate, box, etc., or the sale of the separated parts by subjecting the sale of all the parts to that control. To practical men, desiring to preserve the national and exclude the State jurisdiction, the suggestion of a policy was not tardy. Inconvenient and riskful, and expensive as the use of small packages would be, said they, we must undergo it. We have a right to import and to sell, if only we do not break bulk. We have a right even to retail, if only we do not break bulk. Let us then use packages small enough to be sold without division.

In Austin *v.* Tennessee [4] this endeavor to secure a constitutional right was made. Congress had required that cigarettes should be put up in pasteboard packages of 10, 20, 50, or 100. Cigarettes put up in packages of ten were sold at Durham, N. C., to Austin, a citizen of Tennessee. Pasteboard boxes were piled on the floor of the factory. The express company's employee came for them, carrying with him a basket into which he put them, and which he placed upon the cars. Arrived at its destination, an agent of the company took the basket to Austin's store, poured its contents upon his counter and carried the basket away. A law of Tennessee made it criminal to sell cigarettes. This law was invalid, so far as applicable to a first sale in the original package.

[1] Schollenberger *v.* Pennsylvania (1898) 171 U. S. 1.

[2] Leisy *v.* Hardin (1890) 135 U. S. 100.

[3] Austin *v.* Tennessee (1900) 179 U. S. 343; Cook *v.* Marshall County (1905) 196 U. S. 261.

[4] (1900) 179 U. S. 343.

A phrase is used by Brown, J., the writer of the opinion, which suggests that possibly there was no original package, and that, if there was none, there was no right to import the articles. It is startling to learn, even by an insinuation, that a State has absolute power over importations, if no packages are used. The constitution says not a word about packages. If live stock, horses, cattle, sheep, if coal or iron, is put aboard a ship in no inclosure, are we to be told that the importation of these things is not commerce?

But, there were enclosures of the cigarettes. There were pasteboard boxes. These were the first enclosures, and therefore, in one sense, the "original" packages. These packages were thrown into a basket, but, not by the vendor. Nor was the basket the vendor's. Nor was it intended to be left with the vendee. The vendee did not get possession of the cigarettes while they were in the basket. Of it he never had possession. Generally, the original package is the package in which the importer receives the thing imported; it is a part of the imported bulk. It is for him to say whether, when and how the bulk shall be broken. Austin had no such power over the basket. There is a feeble suggestion nevertheless, that the basket was the original package. The ship's hold in which coal is imported, the car in which it is brought into the State, would be as much an original package, for they prevent the coal's laterally spreading, and the change of their place is the change of place of their contents.

Not willing, however, to place the decision of the case on the ground that the basket was the original package, or that there was no original package, and therefore no commerce over which congress, and not the State, had control, Brown, J., provisionally conceding that each pasteboard box was the original package, proceeds to lay down a new principle, viz., that not every original package can be sold by the importer despite the State's prohibition, but only original packages of a certain size. The size is not determined by naming its cubical dimensions, or the material which encloses the bulk, but is defined in part by history, and in part by intention. The package, we are informed must be in the "form in which from time immemorial, foreign goods have been brought into the country." But,

these cigarettes were not foreign goods. Foreign goods are of infinite variety, and they do not all come in the same kind of packages. Silks do not come in casks, nor potatoes in pasteboard boxes. New kinds of goods are from time to time brought into the country. Suppose a kind of package has been used 25 years past only. Will it be deemed to have been used from time immemorial? Cigarettes have not existed from time immemorial. But why attempt to put a judicial straight-jacket upon business? Why is the merchant not allowed to use whatever kind of package convenience, economy, or even caprice suggests? Why put the business of the country under the yoke of a petty abstraction? If a merchant chooses to use a little package, why deprive him of the right to make a sale, which he would have had, had it been a big package?

Another test, however, is intimated. It is suggested that the use of some packages is *bona fide*, and that of others *mala fide*. The size must be that of "packages in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States." This means, apparently, that if a man wants to enjoy the constitutional right of importing into a State and of selling therein an article of which it unconstitutionally prohibits the introduction and sale, and he adopts such packages as will make this right fruitful, he *ipso facto* forfeits that right. The court practically says to him, you have a right to import and sell in the original package. We will not tell you how large absolutely your package must be. This, however, we will tell you. If you make your packages so small, that you can sell them to consumers, and small dealers, and if it is one of your objects in adopting your package, to sell to those persons, we will hold that you cannot sell to them, even in the original packages. You must let the State balk your commerce to a large degree. You must allow it to prevent a large number of sales, to large classes of persons, and if you select a package so small that you can sell it to many persons, to consumers, and small dealers, you will, by that very selection, make the State's prohibition effectual. Introduce big packages and sell them to the few that can be persuaded to buy, with the knowledge that they cannot, in turn, sell; but do not introduce little packages, with the intention to sell to those who do not need or want to sell in

turn. You are superior to State law, the constitution makes you so, but only if you do not try to be superior. If you try to be superior, you shall, *ipso facto*, become subject to it. The State cannot control sales to consumers, in original packages, but if you adapt your packages to consumers, the State shall control your sales even in these packages.[1] In short, the merchant must enjoy his constitutional exemption from State interference with commerce, in moderation. He must be content that one hundredth or one thousandth of it is exempt.

There is, in Austin *v.* Tennessee, a sad note of conviction that the package test has broken down. "While this court," says Brown, J., "has been alert to protect the rights of non-resident citizens, and has felt it its duty, not always with the approbation of the State courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, it will not lend its sanction to those who deliberately plan to debauch the public conscience, and set at naught the laws of a State." But in Brown *v.* Maryland, and in many other cases, the party has "set at naught the laws of the State", and the Supreme Court has abetted him. He has refused to pay a tax, which the State has commanded him to pay. He has sold oleomargarine or beer in defiance of State prohibition. The Supreme Court has applauded him, holding that the State was commanding or prohibiting what it had no constitutional power to command or prohibit. That is what Austin and Cook held. Wherein were they worse than Leisy, or Brown, or Schollenberger? If Austin was debauching the public conscience what was Leisy doing? The former sold cigarettes; the latter beer. Of whom was the business the more demoralizing?

It is difficult to understand the peculiar scruple of the court, in thinking it right to oppose a State law, if you want to sell big packages, which you have not adapted to a consumer's need, and in thinking it wrong to oppose the same law, if you want to sell packages, to many buyers, to whose needs you have adapted them.

[1] A similar view is expressed by the same judge in Cook *v.* Marshall County (1905) 196 U. S. 261, another cigarette case. The pasteboard boxes were shovelled loose into a car. No basket or enclosure other than the car was used.

Has not the time arrived to abandon the judge-made canon that the immunity of an import from State control, depends upon its remaining in the form in which it first appeared within the State, and in the ownership of the importer, or, retaining that, to concede the right of the importer to import for retail, and in packages designedly adapted, without breach, to purchase by consumers?

WILLIAM TRICKETT.

CARLISLE, PA.